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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 541

ARTURO FORNARIS, JR.,
Appellant,

v.

THE RIDGE TOOL CO., *et al.*,

and

THE COMMONWEALTH OF PUERTO RICO,
Appellees.

On Appeal from the United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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The motion of the Ridge Tool Company to dismiss or affirm this appeal in no way detracts from the substantiality of the questions presented or from the appropriateness and indeed the need of some affirmative action by this Court. That fact is apparent from the arguments advanced in that motion, arguments as to which only the following need be said:

1. **The incomplete record dictates abstention from resolving the constitutionality of the Dealer's Act until more facts are developed.**

The motion to dismiss or affirm (p. 26) acknowledges that the record here consists of nothing more than (1) a complaint "alleging that Appellee had terminated Appellant's 29-year distributorship contract; that the termination was without just cause and illegal in Puerto Rico; and that Appellant was entitled to indemnification of $175,000," and (2) a motion to dismiss that "put the constitutionality of Law 75 directly and unavoidably into question."[1]

Thus there is present at this juncture one of those "hypothetical controversies which may never become real," *Electric Bond & Share Co. v. S.E.C.*, 303 U.S. 419, 443 (1938), and which this Court has consistently held to be outside the realm of constitutional adjudication. No facts have been proved or conceded. There is not even a sketchy "Agreed Statement of Facts" of the type which had been held to constitute too "fragile a record" to permit adjudication of "matters of serious public concern." *Public Affairs Press v. Rickover*, 369 U.S. 111 (1962). Until more facts have been explored and developed, there is here nothing more than a hypothetical controversy swirling about facts that are unknown or that may never come into existence.

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[1] The Statement of the Case in the motion to dismiss or affirm (p. 5) is understandably short and is able to point only to the following facts as pertinent to the adjudication below:

> "The complaint alleged that a distribution contract between Fornaris and The Ridge Tool Company was terminated by it on April 15, 1966, in violation of Law 75 . . . . Ridge Tool moved to dismiss the Fornaris complaint on the ground that Law 75 was unconstitutional."

In other words, the Puerto Rican Dealer's Act has been invalidated by the First Circuit upon the unproved hypotheses that (1) there was an otherwise valid franchise agreement terminable at will; (2) there was a termination that in fact was without "just cause," thus bringing the Dealer's Act into operation; (3) the appellant Fornaris was entitled to recover damages suffered by reason of the termination; and (4) the appellee Ridge Tool Co. had no defense to the suit other than the alleged invalidity of the Dealer's Act. One or more of those four critical factors may never become a reality; and until all four of them are realized, the factual situation must be considered hypothetical for purposes of constitutional adjudication.[2]

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[2]See *McGregor-Doniger, Inc. v. Tribunal Superior de Puerto Rico*, 63 Colegio de Abogados (Case No. 0-69-159), reprinted in the appendix to the Appellee's motion to dismiss or affirm. In that case the Supreme Court of Puerto Rico was met with a contested claim that a distributorship contract, containing an arbitration clause, had been unjustly terminated in violation of the Dealer's Act. The Supreme Court stayed further proceedings pending arbitration to determine the following critical facts (Mot. App. 6a):

> "(1) the nature and efficacy of the contract in question; (2) the relationship of the parties under the contract; (3) if there was just cause to cancel same under Law #75; (4) if the commissions alleged in fact 4 of the complaint are owed; (5) any other controversy that has arisen and is pending between the parties and the said contract."

Only after these facts had been determined, facts which are also absent from the instant case, could the Puerto Rican court then determine "the applicability of Law #75 to the contract in question, as well as its constitutionality." Mot. App. 7a.

The statements from the opinion respecting the "just cause" provision of Law #75, quoted at p. 25 of the motion to dismiss or affirm, are plainly dicta. The only point decided was the necessity of arbitration to discover the essential facts.

An overt example of the First Circuit's resort to assumptions as a substitute for established facts is to be found in its opinion. Jurisdictional statement appendix, p. 33. There being no evidence or allegation that the termination was or was not contrary to the terms of the contract, the court was forced to say that "*we assume* that it was in accordance therewith, and that plaintiff's rights depend solely upon Law 75." (Emphasis added). On that unproved factual assumption rested in large part the court's ensuing constitutional analysis and application.

This, then, is a classic instance where a federal court should have abstained from testing the constitutional validity of a local statute. To perform such a test at this juncture, where there is no proof or assurance as to the controlling facts or as to the applicability of the statute to such facts, is to engage in an advisory opinion without benefit of an actual or matured case or controversy. On that basis alone, the First Circuit's judgment in this case cannot stand. Corrective action by this Court thus becomes appropriate.[3]

2. Abstention is further warranted in the absence of an authoritative construction of the Dealer's Act by the Puerto Rico Supreme Court.

The basic error of the First Circuit, the error that led to that court's misapprehension of applicable constitutional doctrines, was its attempt to read the Dealer's Act and to assess the statute's validity without sufficient facts before the court. Without such facts, it was

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[3] For a comprehensive statement of the conditions under which this Court, and indeed any federal court, should indulge in constitutional adjudication, see Mr. Justice Brandeis' opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-348 (1936).

impossible to know precisely which sections of the statute were applicable and hence were ripe for interpretation and constitutional assessment. And that basic error was compounded by the First Circuit's refusal to abstain from construing and assessing the Act until the Supreme Court of Puerto Rico could give the statute, or its relevant sections, an authoritative construction.

The motion to dismiss or affirm merely says (p. 23) that the language and purpose of the Dealer's Act are so clear and unambiguous as to make abstention unnecessary and inapplicable; any different construction that the Supreme Court of Puerto Rico might adopt is denominated as "obviously strained" and "tantamount" to repeal of the statute. But such a thesis is an exercise in futility. Until one knows precisely the facts to which a new statute, or parts thereof, is to be applied, one cannot have the assurance that constitutional adjudication demands—i.e., the assurance that particular statutory provisions and particular interpretations thereof are necessarily brought into focus by the facts. And many statutory concepts, such as the "just cause" and the indemnification concepts of the Dealer's Act, acquire much of their meaning when viewed in the context of the specific facts to which they are to be applied.

For example, the Supreme Court of Puerto Rico has consistently viewed the "just cause" concept, as it appears in other Puerto Rican statutes, as deriving meaning "in accordance with the facts of each case brought before its consideration" and as not necessarily being limited to the stated legislative definitions. See cases cited in *Construction Machinery & Supplies Corp. v. Construction Machinery Co.*, (Superior Ct. P.R., 1968), at p. 57 of the appendix to the jurisdictional statement herein. And such a statutory concept "should further be supplemented, when a case may merit it, with statutory precepts drawn from other laws of the

State." *Ibid.* Additional aid may come from various principles of the civil law of Puerto Rico.

Thus when the Appellee repeats (motion, p. 8) the First Circuit's hasty conclusion that the Dealer's Act contains no provision for mitigation of damages, completely overlooked is the strong possibility that the damage provision of the Act would be interpreted by the Supreme Court of Puerto Rico in the light of Article 1056 of the Civil Code of Puerto Rico (1 L.P.R.A. §3020) which provides that damages may be mitigated in all types of civil actions.[4]

Enough has been said to demonstrate that the First Circuit's wide-ranging interpretations of various sections of the Dealer's Act lack the requisite trustworthiness, particularly since those interpretations were rendered without reference to proven facts.[5] The Act simply cannot be read intelligently, moreover, unless viewed in the context of other Puerto Rican statutory law and civil law concepts. By reason of these circumstances, combined with the respect due the Commonwealth of Puerto Rico, abstention should have been decreed by the First Circuit.

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[4]See also the comment of the Superior Court in the *Construction Machinery* case: "In connection with the damages contemplated by Section 278b of the law (Title 10 L.P.R.A.), we are of the opinion that the same does not limit the power of the Court to indemnify a distributor upon the basis of the factors set forth in the said section." Jurisdictional statement appendix, pp. 60-61.

[5]In the *Construction Machinery* case, the Superior Court said "that Law No. 75 is one which should be interpreted case by case and that only after the presentation of the whole evidence will the Court be in a position to determine whether there was an impairment of the existing relationship, or if there was a unjustified refusal to renew a contract or if a contract was terminated without just cause." Jurisdictional statement appendix, p. 60.

It need only be added that the pendency of this case for four years (motion, p. 26) is no argument against application of the abstention doctrine. Most of those years were consumed by awaiting the action of the First Circuit on other appeals, which became aborted. See jurisdictional statement, pp. 6-7. Prompt action by the Supreme Court of Puerto Rico can be anticipated when this or other similar cases already pending in the Puerto Rican courts are brought to its attention. Many of the latter cases already have fully developed fact situations.

3. The Appellee's arguments relative to the Commerce Clause and the antitrust laws cannot be entertained by this Court in support of the decision below.

The motion to dismiss or affirm (Parts III and IV, pp. 19-22) renews certain arguments made by the Appellee in the First Circuit, but ignored by that court in rendering the judgment in question. Those arguments involve allegations that the Dealer's Act unduly burdens interstate commerce and is inconsistent with the federal antitrust laws.

But those arguments can serve neither to support the decision below nor to justify this Court's avoidance of review of that decision. The First Circuit invalidated the Dealer's Act solely by reference to concepts thought to be embodied in the Contract and Due Process Clauses of the Constitution. And this Court's review of that First Circuit judgment should be premised solely on an assessment of the substantiality and correctness of the constitutional conclusions actually drawn by the First Circuit. It would be an intolerable situation, if the constitutional concepts utilized by the First Circuit be thought to be improper or inadequate, to allow the erroneous judgment of constitutional invalidity to stand unreviewed and uncorrected simply because other con-

stitutional contentions might have been properly utilized to produce the same result. The respect due the Commonwealth of Puerto Rico, or any sovereign State, dictates that a federal court judgment striking down one of its statutes be structured on something more substantial than constitutional concepts that might have been but were not used.

In *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940), this Court made clear that, in a case coming from a state court where a state statute has been held invalid on an erroneous construction of the Constitution, this Court will not entertain other grounds of attack on the statute that were not raised *or decided* in the state court. The fact that a local statute has been invalidated by a federal appellate court rather than a state court should not make this *McGoldrick* rule any less applicable. Whether rendered by state or federal courts, "their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds . . . which, in the course of proceedings there, have been abandoned." 309 U.S. at 435.

4. The First Circuit's invalidation of the Dealer's Act by use of contract impairment and due process concepts is unwarranted.

The motion to dismiss or affirm (pp. 6-18) raises more questions than it settles respecting the advisory opinion of the First Circuit. While many of the arguments advanced in the motion are academic by virtue of the absence of proven facts, a few comments may be appropriate:

(1) Any court opinion that is uncertain as to which of three constitutional provisions operates to outlaw a legislative enactment is likely to result in constitu-

tional and practical confusion. The First Circuit's opinion is no exception.

For example, to the extent that the court invalidated the Dealer's Act by importing contract impairment concepts into the Due Process Clause of the Fifth Amendment, the decision has most serious implications with respect to Congressional power. Indeed, the decision in that respect brings into constitutional question the federal Automobile Dealers' Day in Court Act. That statute, despite Appellee's protestations (motion, pp. 7-9), coincides with the Puerto Rican law to the extent that both enactments penalize terminations marked by coercion, intimidations or threats. Under the ruling below, the federal statute could be considered invalid under the Fifth Amendment as interfering with the automobile manufacturer's asserted right to terminate "unconditionally and without liability" (motion, p. 12).

(2) One of questionable assumptions underlying the opinion of the first Circuit, an assumption running throughout the Appellee's motion, is that the Dealer's Act can be construed to constitute an impairment of contracts in a retroactive and unconstitutional sense. Even if there were a record here showing a contract terminable at the will of the manufacturer, it is doubtful if a statute providing indemnification for the unjust exercise of an arbitrary termination right can properly be said to interfere with a substantive or substantial obligation of the contract. Providing such indemnification may be said to be a mere alteration of the remedies available under the contract, as to which States are free to legislate in the public interest without limitation by the Contract Clause. See, e.g., *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 128 (1937). And, since such legislation provides for an alteration in the remedy only where an unjust termination occurs *after* the enactment of the statute, it may be

doubted whether the statute—as applied to such a factual situation—is retroactive in any sense of that word.

(3) Finally, even if the Dealer's Act, as applied to a proved set of facts, were construed as impairing a contract obligation, the conclusive answer to the constitutional objections of the First Circuit is to be found in the cardinal principle that has been stated and restated by this Court—that not all impairments are outlawed by the Contract Clause, which recognizes that "the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Building Loan Assn. v. Blaisdell*, 290 U.S. 398, 434 (1934); *El Paso v. Simmons*, 379 U.S. 497, 508 (1965). In short, both the contract impairment and the due process concepts of the Constitution recognize that certain invasions of private contract rights may be justified in the public interest. Such is the case here.

CONCLUSION

For these various reasons, supplementing those in the jurisdictional statement, appropriate action should be taken by this Court to vacate or reverse the judgment below.

Respectfully submitted,

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